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IN THE

Supreme Court of the United States

BENEDICTO V. YUJUICO, TERESITA M. YUJUICO AND THE BVY GROUP, INC.,
PETITIONERS,

VS.

FIRST PACIFIC BANK LIMITED, A HONG KONG BANKING CORPORATION,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether California law permitting a court to unilaterally determine that an arbitration dispute is "wholly groundless", and thereby refuse to enforce a contractual arbitration agreement governed by the Federal Arbitration Act pursuant to which the parties have expressly agreed to submit all disputes regarding arbitrability to an arbitrator, unlawfully preempts the Federal Arbitration Act in violation of the Supremacy Clause of the United States Constitution.

2. Whether an ex parte judgment of foreclosure and order of sale of a private residence entered without the parties' bargained for notice violates the due process clause of the Fourteenth Amendment of the Federal Constitution.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are listed in the caption. Petitioner The BVY Group, Inc., is a California corporation wholly owned by Petitioners Benedicto and Teresita Yujuico, husband and wife. There are no parent corporations nor any publicly held companies which hold any stock in Petitioner The BVY Group, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Authorities	v
I.	
Opinions Below	1
II.	
Jurisdictional Statement	1
III.	
Constitutional and Statutory Provisions Involved	1
IV.	
Statement of the Case	2
V.	
Reasons for Granting the Writ	7
A. The Decision by the California Supreme Court in *McCarroll* to Permit the Superior Court to Determine the Arbitrability of a Dispute Where the Parties Have Expressly Confered That Authority On the Arbitrator Pre-empts Federal Arbitration Law in Violation of the Supremacy Clause of the United States Constitution	7
1. In Enacting The Federal Arbitration Act, Congress Withdrew The States' Power To Require A Judicial Forum For Resolution Of Disputes Which The Parties Agreed To Arbitrate	7
2. This Court's Decision In *Perry v. Thomas* Expressly Determined That California Law May Not Be Applied To Pre-Empt The Federal Arbitration Act	8

3. The *McCarroll* Decision Conflicts With This Court's Decisions Enforcing International Commercial Arbitration Agreements Challenged In State Court 9

B. The *McCarroll* Decision Creates a Peremptory Gatekeeping Exception to Enforcement of Arbitration Agreements Which is Not Authorized by Federal Law 11

1. The Parties Expressly Adopted Both The International Arbitration Rules And Title 9.3 Of The California Code Of Civil Procedure, Leaving No Doubt As To Their Intent To Submit All Disputes To Arbitration 13

2. The *McCarroll* Decision Should Be Limited To Its Facts Which Are Distinguishable From Those In The Case At Bar 15

3. The Ninth Circuit Of The United States Court of Appeals Recently Issued A Decision Upholding The Right Of Private Parties To Contract For Arbitration 16

C. The Decision by the California Court of Appeal to Permit the Foreclosure and Sale of Petitioners' Residence Without the Bargained for Notice Violates the Due Process Clause of the Fourteenth Amendment 18

VI.

Conclusion 21

APPENDIX A Decision of the Court of Appeal A-1

APPENDIX B Judgment of the State Superior Court.. B-1

APPENDIX C Decision of the California Supreme Court Denying Review C-1

TABLE OF AUTHORITIES

CASES

Allied-Bruce Terminix Companies, Inc. and Terminix International Company v. Dobson, 513 U.S. 265, 130 L.Ed.2d 753, 115 S.Ct. 834 (1995) 4, 6, 7, 10, 11

ATSA of California v. Continental Ins. Co., 702 F.2d 172 (9th Cir. 1983) 7

Bauhinia Corp. v. China Nat. Machinery & Equipment, 819 F.2d 247 (9th Cir. 1987) 7

Brant v. California Dairies, 4 Cal.2d 128, 48 P.2d 13 (1935) 14

Circuit City Stores, Inc. v. Adams, 99-1379 16

Green Tree Financial Corp. v. Randolph, 99-1235 16

D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-186, 31 L.Ed.2d 124, 92 S.Ct. 775 (1972) 18

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L.Ed. 2d 206, 103 S.Ct. 1301 (1983) 5

Drake Bakeries v. Bakery Workers, 370 U.S. 254, 8 L.Ed.2d 474, 82 S.Ct. 1346 (1962) .. 5

First Options of Chicago v. Kaplan, 514 U.S. 938, 944, 131 L.Ed.2d 985, 115 S.Ct. 1920 (1995) 4, 14

Hobbs v. Weiss 73 Cal.App.4th 76, 86 Cal.Rptr.2d 146 (1999) 20

Lambert v. California, 355 U.S. 225, 228, 2 L.Ed.2d 228, 78 S.Ct. 240, reh den 355 U.S. 937, 2 L. Ed. 2d 419, 78 S. Ct. 410 (1985) 18

McCarroll v. L.A. County etc. Carpenters, 49 Cal.2d 45, 315 P.2d 322 (1957) 3, 5, 6, 7, 9, 11, 15, 16

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
415 U.S. 117, 38 L.Ed.2d 348, 94 S.Ct. 383 (1973) .. 8

Mediterranean Co. v. State Farm Fire & Casualty Company,
66 Cal.App.4th 257, 77 Cal.Rptr.2d 781 ..... 19, 20

Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,
460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927 (1985) ... 4, 8

Perry v. Thomas,
482 U.S. 483, 96 L.Ed.2d 426, 107 S.Ct. 2520 (1987) 4, 6, 8

Portland General Electric Company v. U.S. Bank Trust National Association
(July 18, 2000) 2000 Daily Journal D.A.R. 7819 ... 16

Raytheon Co. v. Rheem Manufacturing Co.,
322 F.2d 173 (1963) 17

Rooker v. Fidelity Trust Co.,
263 U.S. 413, 68 L.Ed. 362, 44 S.Ct. 149 (1923) 5

Southland Corp. v. Keating,
465 U.S. 1, 79 L.Ed.2d 1, 104 S.Ct. 852 (1984) 4, 6, 7, 8, 9, 10, 11

United Steelworkers v. American Mfg. Co.
(1960) 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 . 18

Volt Information Sciences Inc. v. Stanford Univ.,
489 U.S. 468, 103 L.Ed.2d 488,
109 S.Ct. 1248 (1989) 11

UNITED STATES CONSTITUTION

Article VI, Section 2	1, 5, 9, 10, 11
Fourteenth Amendment	2, 18

STATUTES

California Civil Code, section 1636	14
California Code of Civil Procedure section 166(a)	19
California Code of Civil Procedure section 657	19
California Code of Civil Procedure section 663	19
California Code of Civil Procedure section 1003	18
California Code of Civil Procedure section 1005.5	19
California Code of Civil Procedure, sections 1297.11-1297.432	12
California Code of Civil Procedure section 1297.13	12
California Code of Civil Procedure section 1297.51	12
California Code of Civil Procedure section 1297.161	12
California Code of Civil Procedure section 1297.166	12
California Code of Civil Procedure section 31512	9
California Labor Code Labor Code section 229	6
Title 9, United States Code, § 1 et seq.	2
Title 9, United States Code § 2	2, 7, 8, 9, 10, 17
Title 28, United States Code, § 1257	1

RULES

International Arbitration Rules of the American Arbitration Association, Article 15.1	3, 12, 15
International Arbitration Rules of the American Arbitration Association, Article 15.3	3, 12, 15
United Nations Commission On International Trade Law (UNCITRAL)	11

TREATISES

Kaufman, Appellate Advocacy in the Federal Courts, 79 F.R.D. 165, 171 (1977) 20

Knight, Fannin, Chernick & Halderman, CAL. PRAC. GUIDE: ALTERNATIVE DISPUTE RESOLUTION (The Rutter Group 1999) Section 5:214.4, pp. 5-81 to 5-82 14

IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioners Benedicto V. Yujuico, Teresita M. Yujuico and the BVY Group, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment below.

I. OPINIONS BELOW

The decision of the California Court of Appeal is unreported; it is reprinted in the Appendix to this Petition at p. A-1. The Judgment of the Superior Court for the County of San Mateo is reprinted in the Appendix at p. B-1. The decision of the California Supreme Court denying review is reprinted in the Appendix to this Petition at p. C-1.

II. JURISDICTIONAL STATEMENT

On July 24, 2000, the California Supreme Court filed its decision denying review of the California Court of Appeal's decision entered on June 15, 2000. Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review on a writ of certiorari the decision of the California Court of Appeal.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Section 2 of the Constitution of the United States states as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and

the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 1 of the Fourteenth Amendment to the Constitution provides in pertinent part:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

9 USC § 2, states as follows:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon any such grounds as exist at law or in equity for the revocation of any contract."

IV. STATEMENT OF THE CASE

This action was instituted by Respondent's ex parte application for entry of a judgment of foreclosure and order of sale ("Judgment") of Petitioners' family residence in Atherton, California ("Residence"), claiming that Petitioners had defaulted on a loan payment.

Petitioners opposed the ex parte application on the ground that the parties had a written agreement ("Agreement") to arbitrate all disputes governed by the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. ("FAA"), that Petitioners had properly demanded arbitration, and that Respondent could not apply directly to the courts for entry of the Judgment under the terms of the Agreement.

The parties' arbitration clause states, at paragraph 19 of the Agreement:

> "In the event of any dispute relating to or arising out of this agreement, the exclusive forum for resolution of any such dispute shall be by arbitration in San Francisco under the authority of JAMS/ENDSIPUTE in accordance with the International Rules of the American Arbitration Association." (CT 151.)

Article 15.1 of the International Arbitration Rules of the American Arbitration Association ("AAA") states that *"the tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement".*

Article 15.3 of the Rules further states that *"a party must object to the jurisdiction of the tribunal or to the* ***arbitrability of a claim*** *or counterclaim no later than the filing of a statement of defense as provided in Article 3 . . ."* [Emphasis added.]

Respondent refused to submit the dispute to arbitration, claiming it was a sham and that the arbitration clause did not require submitting disputes regarding arbitrability to the arbitrator.

On October 9, 1998, during an ex parte proceeding, the Superior Court granted Respondent's application and entered the Judgment. Respondent immediately sold the Residence to itself by credit bidding its own secured interest. Petitioners were recently evicted from the Residence on October 3, 2000.

On June 15, 2000, the California Court of Appeal for the First Appellate District affirmed the Judgment, basing its opinion on the California Supreme Court decision in *McCarroll v. L.A. County etc. Carpenters,* 49 Cal.2d 45, 315 P.2d 322 (1957) (*"McCarroll"*).

The *McCarroll* decision permits judicial consideration of the merits of a dispute governed by the FAA *before* submitting

the matter to arbitration if the superior court determines that the claim is "wholly groundless"; notwithstanding the express contractual intent of the parties to reserve jurisdiction exclusively to the arbitrator under Articles 15.1 and 15.3 of the International Arbitration Rules of the AAA.

Thus, the *McCarroll* decision creates an unlawful peremptory gatekeeping exception to enforcement of arbitration agreements governed by the FAA which may be unilaterally exercised by the court even when the parties have expressly agreed to submit all disputes regarding jurisdiction and the arbitrability of a claim to arbitration, thereby pre-empting the Federal Arbitration Act in violation of the Supremacy Clause of the United States Constitution.

The peremptory judicial gatekeeping exception created by the *McCarroll* decision is also in direct conflict with this Court's decisions in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944, 131 L.Ed.2d 985, 115 S.Ct. 1920 (1995) ("*First Options*"); *Allied-Bruce Terminix Companies, Inc. and Terminix International Company v. Dobson*, 513 U.S. 265, 130 L.Ed.2d 753, 115 S.Ct. 834 (1995) ("*Allied-Bruce*"); *Perry v. Thomas*, 482 U.S. 483, 96 L.Ed.2d 426, 107 S.Ct. 2520 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 79 L.Ed.2d 1, 104 S.Ct. 852 (1984) ("*Southland*") and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

Petitioners filed a Petition For Review of the Court of Appeal's opinion with the California Supreme Court on July 20, 2000, which was denied on July 24, 2000.[1] Petitioners obtained a 60-day stay of enforcement of the Judgment from the California Superior Court for the County of San Mateo, which stay expired on September 24, 2000.

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[1] Petitioners obtained such quick review of the Petition because they also requested an immediate stay of the Judgment in a companion Petition. That stay request was denied.

On September 14, 2000, Petitioners filed a complaint seeking rescission of the parties' Agreement with the United States District Court for the Northern District of California, based on their mistake as to the enforceability of their agreement to arbitrate all disputes in accordance with the International Arbitration Rules. On September 19, 2000, Petitioners filed an application for a temporary restraining order in the District Court, seeking a preliminary injunction restraining enforcement of the Judgment.

On September 22, 2000, the Honorable Phyllis J. Hamilton, United States District Court Judge, denied Petitioners' application, finding that the rescission action did not raise a federal claim, and that federal statutory authority over direct appeals from the state courts [including federal claims "inextricably interwined" with those a state court has already decided], lies exclusively with this Court pursuant to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L.Ed. 362, 44 S.Ct. 149 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct. 1301 (1983). Pursuant thereto, Petitioners voluntarily dismissed the rescission action.

On September 28, 2000, Petitioners filed a petition for immediate stay of the Judgment pending certiorari by this Court with the Court of Appeal. That petition was denied on October 2, 2000. On October 3, 2000, Petitioners submitted an Application For Stay Of Mandate of the Opinion of the California Court of Appeal and the Judgment of the Superior Court of the State of California, County of San Mateo, to the Honorable Sandra Day O'Connor, Case No. 00-A286. Associate Justice O'Connor denied Petitioners' Application on October 4, 2000.

Review must be granted to resolve the conflict between the *McCarroll* decision and the enforceability of arbitration agreements governed by federal law, in order to preserve the integrity of the FAA and the Supremacy Clause of the United States Constitution. Otherwise, state courts will be free to pre-empt federal arbitration law.

The time is ripe for review of this issue. Indeed, the California Supreme Court recognized back in 1957 that the

McCarroll opinion was in "irreconcilable conflict" with some of the federal decisions at that time. (*McCarroll, supra*, 49 Cal.2d at 67.)

Further, the *McCarroll* decision has already been partially abrogated by this Court in *Drake Bakeries v. Bakery Workers* 370 U.S. 254, 8 L. Ed. 2d 474, 82 S. Ct. 1346 (1962), which held—contrary to the ruling *McCarroll*—that disputes about no-strike clauses were arbitral issues.

Similarly, the decisions in *Southland* and *Bruce-Allied* abrogate the *McCarroll* decision insofar as its permits the superior court to perform a peremptory gatekeeping function even when the parties have expressly conferred that function upon the arbitrator under their agreement. (*Southland, supra,* 465 U.S. at 7, 10, 79 L.Ed.2d at 10, 11-12; *Allied-Bruce, supra,* 513 U.S. at 281, 130 L.Ed.2d at 769; *McCarroll, supra,* 49 Cal.2d at pp. 65-66.)

Moreover, in *Perry v. Thomas,* 482 U.S. 483, 96 L.Ed.2d 426, 107 S.Ct. 2520, this Court specifically held that the FAA pre-empted a California statute (§ 229 of the Labor Code) which permitted the collection of wages without regard to the existence of a private international commercial arbitration agreement.

There has been a dramatic shift during the past decade by the legal community as a whole away from litigation as the principal means of resolving disputes to alternative dispute resolution ("ADR"), in particular, arbitration, especially in the business community.

This shift has been encouraged and strongly promoted by the courts in an effort to reduce caseload and more efficiently dispose of disputes. As time goes by and this movement toward ADR and away from litigation grows, the courts will begin seeing—and having to dispose of—a tremendous amount of arbitration disputes governed by the FAA, for with the fast growing use of the Internet and the rapidly shrinking global marketplace, it will soon be nearly impossible to transact any business that does not involve interstate commerce.

The International Arbitration Rules of the AAA, and the FAA will increasingly govern more and more arbitration disputes in this state; and United States citizens and people doing business in this country need to be able to contract with certainty regarding the enforceability of arbitration agreements.

Accordingly, there is a compelling need for clarity and uniformity on the issue of enforcement of private, commercial arbitration agreements governed by the FAA in California and throughout the country which necessitates this Court's review.

IV. REASONS FOR GRANTING THE WRIT

A. The Decision by the California Supreme Court to Permit the Superior Court to Determine the Arbitrability of a Dispute Where the Parties Have Expressly Confered That Authority on the Arbitrator Pre-Empts Federal Arbitration Law in Violation of the Supremacy Clause of the United States Constitution

1. In Enacting The Federal Arbitration Act, Congress Withdrew The States' Power To Require A Judicial Forum For Resolution Of Disputes Which The Parties Agreed To Arbitrate

"Federal law governs arbitration issues in agreements affecting interstate and foreign commerce." (*Bauhinia Corp. v. China Nat. Machinery & Equipment*, 819 F.2d 247, 249 (9th Cir. 1987); see also, *ATSA of California v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983).)

The FAA: (1) makes written arbitration provisions in contracts evidencing a transaction involving commerce enforceable; (2) preempts state law that seeks to invalidate arbitration agreements; and (3) prohibits state courts from applying state statutes that invalidate arbitrations. (9 U.S.C. § 2; *Southland, supra*, 465 U.S. at 15-16, 79 L.Ed.2d at 14-15; *Allied-Bruce, supra*, 513 U.S. at 272, 130 L.Ed.2d at 763.)

Section 2 of the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.

Thus, in enacting § 2 of the FAA, Congress withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration; and created a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. (*Perry v. Thomas, supra,* 482 U.S. at 489, 96 L.Ed.2d 426, 107 S.Ct. 2520, citing *Southland, supra,* 465 U.S. at 10-12, 79 L.Ed.2d 1, 104 S.Ct. 852 and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra,* 460 U.S. at 24, 74 L.Ed.2d 765, 103 S. Ct. 927.)

2. This Court's Decision In Perry v. Thomas
Expressly Determined That A California Statute May Not Be Applied To Pre-Empt The Federal Arbitration Act

The federal courts have, of course, original jurisdiction over actions involving the FAA. (*Perry v. Thomas, supra,* 482 U.S. 483, 96 L.Ed.2d 426, 107 S.Ct. 2520.)

In *Perry v. Thomas,* a former employee of a brokerage firm brought an action in California Superior Court against his former firm and two other employees, arising from a dispute over commissions on the sale of securities. The former employee alleged, *inter alia,* breach of a contract containing an arbitration provision, but he refused to arbitrate and the other two employees filed a petition in the Superior Court to compel arbitration under § 2 of the Federal Arbitration Act.

The former employee, opposing the petition, cited a California statute providing that actions to collect wages may be maintained without regard to the existence of any private agreement to arbitrate. The Superior Court denied the petition, holding that this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 38 L.Ed.2d 348, 94

S.Ct. 383, was controlling authority to the effect that, in accordance with the California statute, actions to collect wages may be pursued without regard to private arbitration agreements.

The California Court of Appeal, Second Appellate District, affirmed, holding that the California statute was not pre-empted by the Federal Arbitration Act. The California Supreme Court denied the two employees' petition for review.

On certiorari, this Court reversed and remanded in a 7-2 decision. In an opinion by Justice Marshall, joined by Chief Justice Rehnquist and Justices Brennan, White, Blackmun, Powell and Scalia, this court determined that the California statute was in conflict with § 2 of the FAA and was, therefore, pre-empted under the Federal Constitution's Supremacy Clause.

Similarly, the appellate opinion in this action applied the McCarroll decision to defeat the parties' expressed intent to submit all disputes, including the arbitrability of a dispute, to the arbitrator, in direct conflict with section 2 of the FAA and in violation of the Supremacy Clause of the United States Constitution.

3. The California Supreme Court's Decision Conflicts With This Court's Decisions Enforcing International Commercial Arbitration Agreements Challenged In State Court

In *Southland, supra,* this Court held that the California Supreme Court's interpretation of the California Franchise Investment Law (C.C.P. § 31512)[2] as invalidating arbitration agreements covered by the Federal Arbitration Act was unconstitutional.

The parties in *Southland;* namely, Southland Corp. and several franchisers of 7-Eleven convenience stores, entered into a franchise agreement which provided that any controversy or claim arising thereunder would be settled by arbitration in accordance with the Rules of the American Arbitration Association. (*Id.,* 465 US at 3-4, 79 L.Ed.2d at 8.)

[2]Unless otherwise noted, all references herein to "C.C.P." shall refer to the California Code of Civil Procedure.

The franchisers filed suit in California Superior Court alleging, *inter alia,* violations of the Franchise Investment Law, and Southland petitioned to compel arbitration. The trial court refused to compel arbitration under the Franchise Investment Law, the Court of Appeal reversed, and this Court reversed the Court of Appeal, interpreting the Franchise Investment Law as requiring judicial consideration of all claims brought thereunder and refusing to enforce the parties' agreement to arbitrate.

The *Southland* Court determined that the interpretation of the Franchise Investment Law as requiring judicial consideration of claims, rather than arbitration as agreed by the parties, directly conflicted with section 2 of the Federal Arbitration Act and violated the Supremacy Clause of the United States Constitution. (*Southland, supra,* 465 U.S. at 10-11, 16, 79 L.Ed.2d at 11-12, 15.)

The *Southland* Court stated that the effect of the California Supreme Court's refusal to enforce the arbitration agreement between the parties was to *"nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration"*; and further opined that *"[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."* [Emphasis added.] (*Id.,* 465 U.S. at 7, 79 L.Ed.2d at 10.)

Similarly, the Court of Appeal's refusal to enforce the arbitration agreement between the parties herein nullifies a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration in contravention of federal law.

In *Allied-Bruce,* this Court considered a state court dispute concerning the enforceability of a contract's written arbitration clause. In concluding that the Alabama Supreme Court had improperly applied the state's antiarbitration statute to preclude enforcement of the arbitration clause, this Court held that the FAA reaches to the limits of Congress' Commerce Clause power and applies to actions brought in state court

when the transaction involves interstate commerce, whether or not the parties contemplated an interstate connection[3]. (*Allied-Bruce, supra,* 513 U.S. at 277, 130 L.Ed.2d at 763.)

This Court further stated:

> "[w]hat states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing', directly contrary to the Act's language and Congress' intent. See *Volt Information Sciences, Inc.* 489 U.S. at 474, 103 L.Ed.2d 488, 109 S.Ct. 1248.)" (*Allied-Bruce, supra,* 513 U.S. at 281, 130 L.Ed.2d at 769, 115 S.Ct. 834.)

In the instant action, there can be no doubt that the parties' transaction involved interstate commerce; and that the parties expressly agreed that any and all disputes would be resolved in accordance with the International Arbitration Rules of the AAA. (CT 139, ll. 7-12; 145, 151.)

Therefore, the application of the *McCarroll* decision by the Court of Appeal affirming the San Mateo County Superior Court's authority to determine the arbitrability of the parties' dispute, when Petitioners and Respondent expressly agreed to confer that power upon the arbitrator, directly conflicts with the FAA, the Supremacy Clause of the United States Constitution, the *Southland* decision and the *Allied Bruce* decision, necessitating review by this Court.

B. The McCarroll *Holdings Creates a Peremptory Gatekeeping Exceptions to Enforcement of Arbitration Agreements Which is Not Authorized by Federal Law*

The International Arbitration Rules of the AAA are based on the UNCITRAL (United Nations Commission on International Trade Law) model rules. Both those model rules, and the

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[3] In this action, there is no dispute regarding an interstate connection since the parties expressly agreed to be governed by the International Arbitration Rules of the AAA and, necessarily, the FAA (CT 145, 151.)

AAA International Rules, are patently clear regarding the jurisdiction of the arbitrator when parties have embedded those rules in their underlying agreement. (International Arbitration Rules of the AAA, Articles 15.1, 15.3, CT 199-200.)

In addition, California has an International Disputes Resolution Statute (the "International Statute") that is based on UNCITRAL model law. That statute is found in Title 9.3 of the California Code of Civil Procedure (§§ 1297.11-1297.432).

C.C.P. § 1297.161 *reiterates the same rule reserving the power to determine jurisdiction to the arbitrator;* and C.C.P. § 1297.166 requires an objecting party to *first* submit a jurisdictional dispute to the arbitrator *before* seeking relief from the courts.

Pursuant to C.C.P. § 1297.13 of the International Statute, the underlying transaction in this matter is international in that (i) the parties to the Agreement have their places of business in different states; (ii) the parties, by incorporating the International Rules of the AAA have evidenced that the subject matter of the Agreement relates to commercial interests in more than one state; and (iii) the subject matter of the Agreement is related to commercial interests in more than one state.

C.C.P. § 1297.51 of the International Statute further mandates that in matters governed by Title 9.3, *no court shall intervene* except when so provided by Code of Civil Procedure section 1297.11-1297.432), or by applicable federal law.

1. The Parties Expressly Adopted Both The International Arbitration Rules And Title 9.3 Of The Code Of Civil Procedure, Leaving No Doubt As To Their Intent To Submit All Disputes To Arbitration

In the Agreement, the parties expressly adopt *both* the International Arbitration Rules of the AAA and, notably, the International Statute, as reiterated below:

> "4. *Arbitration.* The parties to this Agreement have submitted all disputes between them for settlement by arbitration under the authority of J.A.M.S./ENDISPUTE, San Francisco, California. *Said arbitration is deemed to be private, binding, international arbitration as provided by Title 9.3 of the California Code of Civil Procedure.* The parties hereby confirm their agreement to submit their disputes to arbitration and that this confirmation constitutes a written arbitration agreement. The parties hereby confirm their agreement to the appointment of the Hon. Harry Low as sole arbitrator. . . [Emphasis added]. (CT 145, par. 4.)
>
> "19. *Arbitration.* In the event of any dispute relating to or arising out of this agreement, the *exclusive forum* for resolution of any such dispute *shall* be by arbitration in San Francisco under the authority of JAMS/ENDISPUTE in accordance with the International Rules of the American Arbitration Association." [Emphasis added]. (CT 151, par. 19.)

Under California law, the rules selected by the parties to govern their arbitration is sufficient evidence of a "clear and unmistakable" intent to submit disputes regarding the arbitrability of a claim to arbitration:

> "The arbitrator's power to determine arbitrability might also be derived from the rules selected by the parties in their arbitration clause. For example, AAA Commercial Dispute Resolution Procedures expressly give the arbitrator power to determine the arbitrability of disputes, including the scope, validity, or enforceability of the arbitration agreement. [AAA Commercial Dispute Resolution Procedures, Rule R-8.]"

> "JAMS Comprehensive Arbitration Rules and Procedures, Rule 10, is similar. Reference to one of these rules in the arbitration clause effectively makes the rule part of the agreement. [See *First Options of Chicago, Inc. v. Kaplan, supra,* 514 U.S. at 944, 115 S.Ct. at 1925]" (Knight, Fannin, Chernick & Halderman, CAL. PRAC. GUIDE: ALTERNATIVE DISPUTE RESOLUTION (The Rutter Group 1999) §5:214.4, pp. 5-81 to 5-82.)

Thus, there can be no stronger objective evidence of both Petitioners' and Respondent's intent—as expressed in the Agreement—to submit all disputes regarding jurisdiction to the arbitrator, than their express adoption of the International Arbitration Rules of the AAA and Title 9.3 of the California Code of Civil Procedure.

In *First Options of Chicago v. Kaplan, supra,* 514 U.S. at 944, 131 L.Ed.2d at 994-994, this Court held that the question of who has primary power to decide arbitrability turns upon what the parties agreed to, since a party can only be forced to arbitrate those issues it specifically agreed to arbitrate. In deciding whether the parties agreed to arbitrate arbitrability, the courts should apply ordinary state law contract principles that govern formation of contracts. (*Id.,* 514 U.S. at 844; 131 L.Ed.2d at 993.)

In *First Options,* as in the case at bar, the relevant state law requires the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. (See Civil Code section 1636; *Brant v. California Dairies,* 4 Cal.2d 128, 133, 48 P.2d 13 (1935).)

As noted above, the selection of the International Arbitration Rules and Title 9.3 of the Code of Civil Procedure leaves no doubt as to the parties' intent to submit disputes regarding arbitrability to arbitration—and the appellate court's application of the *McCarroll* holding to defeat the parties' intent is contrary to federal and state law and must be reversed.

2. The McCarroll *Holding Should Be Limited To Its Facts Which Are Distinguishable From Those In The Case At Bar*

The Court of Appeal relied upon the California Supreme Court's decision in the *McCarroll* case in affirming the Judgment. In so ruling, the appellate court cited the following passage in the *McCarroll* decision:

> "The arbitrability of a dispute may itself be subject to arbitration if the parties have so provided in their contract. In this situation the court should stay proceedings pending the arbiter's determination of his own jurisdiction *unless it is clear that the claim of arbitrability is wholly groundless."* [Italics added by appellate court] See Appendix A-6, quoting *McCarroll,* 49 Cal.2d at 65.)

Federal law, however, provides no such exception to enforcement of arbitration agreements governed by the FAA. Indeed, as noted above, the International Arbitration Rules (in particular Articles 15.1 and 15.3) provide the exact opposite—that all disputes, including disputes regarding arbitrability, be submitted to arbitration.

In *McCarroll,* the court's entire analysis was premised upon the scope and clarity of the parties' agreement and the extent to which it called for any court involvement in questions of arbitrability and jurisdiction. At the outset, the *McCarroll* Court looked at the arbitration clause and *based on its lack of clarity as to jurisdiction and arbitration,* determined that the parties had not agreed to allow the arbitrator to decide his own jurisdiction.

In decided contrast to the arbitration clause at issue in the parties' Agreement, the arbitration clause in *McCarroll* provided for grievances to be funneled through a series of personnel before even getting to an arbitrator, and the parties agreed to present their disputes to a multitude of different entities: a "craft steward", "special representative", "contractor", "Joint Contractor Board", "Joint Arbitration Committee", and finally, if the dispute remained unresolved, to an arbiter. (*McCarroll, supra,* 49 Cal.2d at 65.)

Given the long succession of decision-makers, the *McCarroll* Court determined that the parties had failed to agree that

the arbitrator had the power to decide his own jurisdiction. It was only because the parties had not clearly stated an intent to permit the arbitrator to decide jurisdiction—*"there is no indication in the present contract that the parties intended any such result"* [i.e., to confer the power of determining jurisdiction upon the arbitrator]—that the *McCarroll* Court assumed responsibility for determining jurisdiction. Thus, the *McCarroll* holding should be expressly limited to situations where the parties have not agreed upon who decides jurisdiction. (*Id.*, at 65-66.)

The facts in the instant action could not be more distinguishable. Appellants and Respondent did agree—at Respondent's insistence—that the arbitrator should decide jurisdiction by selecting the International Arbitration Rules of the AAA and the International Statute to govern their disputes. In accordance therewith, the Court of Appeal's decision is contrary to federal law insofar as it permits superior courts to refuse to enforce arbitration agreements where the superior court makes a peremptory determination that there are no arbitral issues.

3. The Ninth Circuit Of The United States Court of Appeals Recently Issued A Decision Upholding The Right Of Private Parties To Contract For Arbitration

This issue is extremely timely, as evidenced by this Court's grant of review in the *Circuit City Stores, supra,* and *Green Tree, supra,* cases for the current term; and the Ninth Circuit's recent decision in *Portland General Electric Company v. U.S. Bank Trust National Association* (July 18, 2000) 2000 Daily Journal D.A.R. 7819.

The *Portland* case involved a dispute regarding whether Oregon law or the FAA governed a challenge to a final appraisal decision issued pursuant to a commercial contract. The facts are distinguishable from those in the instant appeal, but the Ninth Circuit's holding that courts must keep sacrosanct the right to contract for arbitration and must strictly enforce those rights as written, is applicable to this case. (*Portland, supra,* 2000 Daily Journal D.A.R. at 7821.)

The central issue in *Portland* was whether the district court had properly interpreted the parties' agreed appraisal procedure as an agreement to arbitrate, based on its erroneous conclusion that a prior Ninth Circuit decision [*Raytheon Co. v. Rheem Manufacturing Co.*, 322 F.2d 173 (1963)] had held that a contractually mandated appraisal is the equivalent of an arbitration subject to the FAA. (*Id.*)

In distinguishing the *Raytheon* case, the Ninth Circuit reiterated the principle that courts play a limited role in construing appraisal agreements, serving only to enforce the parties' bargain, not "to add gloss to the parties' own language". (*Id.*)

In analyzing whether the FAA applied to the Portland agreement, the Court acknowledged that "[t]he FAA governs any written provision in a *'contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract.'* 9 U.S.C. § 2." [Emphasis added.] (*Id.*, at 7820.)

The Court then looked to the FAA for a definition of "appraisal", but finding none, stated: *"[a]lthough the FAA does not provide any guidance on definitions, it does direct us to the contract itself."* [Emphasis added.] (*Id.*, at 7820.)

In the instant action, of course, there is no dispute as to the applicability of the FAA because the parties expressly agreed to arbitrate all disputes in accordance with the International Arbitration Rules of the AAA, which are governed by the FAA.

However, the general rule that the FAA governs all contracts evidencing a transaction involving commerce, and further requires the courts to enforce an arbitration agreement as written, is relevant to this case.

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for

> the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." (*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.CT. 1343, 4 L.Ed.2d 1403 (1960).)

That is precisely what Petitioners bargained for by expressly adopting the International Arbitration Rules of the AAA in their arbitration agreement—the arbitrator's judgment—and federal law mandates that the parties' intent to arbitrate be enforced.

C. The Decision by the California Supreme Court to Permit the Foreclosure and Sale of Petitioners' Home Without the Bargained for Notice Violates the Due Process Clause of the Fourteenth Amendment.

The Fourteenth Amendment of the United States Constitution prohibits rendering a judgment depriving a person of property in any contested proceeding without constitutional guarantees of due process. (*D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-186, 31 L. Ed. 2d 124, 92 S.Ct. 775; *Lambert v. California*, 355 U.S. 225, 228, 2 L.Ed.2d 228, 78 S.Ct. 240, reh den 355 U.S. 937, 2 L.Ed.2d 419, 78 S.Ct. 410 (1985).)

The Judgment herein was entered ex parte, without the requisite hearing on the merits guaranteeing Petitioners of the constitutional protection of due process. Thus, at a minimum, there should have been a threshold hearing on the issue of the court's jurisdiction to even conduct an evidentiary hearing and enter judgment prior to the conclusion of the arbitration commenced by Appellants on October 2, 1999.

Further, under California law any "application", such as Respondent's application for ex parte application for entry of judgment, is the same as a motion. (C.C.P. § 1003.)

A motion shall be upon all grounds stated in the written notice, and is deemed to have been made and be pending before the court for all purposes upon the due service and filing of the motion, but this shall not deprive party of a hearing on a motion to which he is otherwise entitled. (C.C.P. § 1005.5.)

It is worth repeating that, in this case, the superior court did not hear oral argument before entering an ex parte judgment of foreclosure and order of sale of Petitioners' home of more than twenty-two years.

Under California Code of Civil Procedure § 166(a), only certain specified motions may be heard in chambers, such as motions to vacate a verdict or for new trial (C.C.P. § 657); motions to vacate a judgment (C.C.P. § 663); all uncontested actions or proceedings; ex parte applications; and motions to tax costs of enforcing a judgment.

Notably, motions to enter judgment by stipulation under Code of Civil Procedure § 664.6 are not included within the motions permitted to be heard in chambers.

The "hearing" on Respondent's ex parte application herein consisted of a research clerk shuttling statements of counsel back and forth to the Judge who was at all times in chambers. The Judge signed the order entering judgment against Petitioners while in chambers.

Thus, the Superior Court effectively deprived Petitioners of their right to make oral argument, leaving all emphasis, nuance and attention to the voluminous and complex details of this case to the research clerk who communicated Petitioners' argument to the Judge in chambers.

As noted in by the Court of Appeal in *Mediterranean Co. v. State Farm Fire & Casualty Company,* 66 Cal.App.4th 257, 264, 77 Cal.Rptr.2d 781 (1998), a hearing affords litigants their *only opportunity* to orally argue their case and to respond to the court's inquiries through the give and take of questioning.

As one leading jurist aptly stated: "An oral argument is as different from a brief as a love song is from a novel. It is an opportunity to go straight to the heart!" [exclamation point in original text]. (*Mediterranean Co. v. State Farm Fire & Casualty Company, supra,* 66 Cal.App.4th at 264, quoting *Kaufman, Appellate Advocacy in the Federal Courts,* 79 F.R.D. 165, 171 (1977).)

In the case at bar, the love song was sung to the clerk who sang it to the judge. Something was lost in the translation.

The case of *Hobbs v. Weiss,* 73 Cal.App. 4th 76, 77, 86 Cal.Rptr.2d 146 (1999), (199 Daily Journal D.A.R. 6583) decided by the Court of Appeal emphatically re-states the point clearly made by the Court in the *Mediterranean* case:

> **"In *Mediterranean Construction* we expressed our frustration with law and motion judges who "refuse to hold oral hearings on critical pre-trial matters of considerable significance to the parties . . . fair warning: Both written and oral argument are complementary parts of good judging and elemental due process."** *(Id.)*

The circumstances here are more dire than those in the *Hobbs* case, where a pre-trial writ of attachment was at issue, and more akin to those at issue in the *Mediterranean* case, where summary judgment was at issue.

The entry of the Judgment without a hearing by the superior court resulted in the loss of Petitioners' home by foreclosure; the forfeiture of penalty damages in the amount of $2,300.000.00 [i.e. the full sum of $7,500,000.00 became due upon entry of the Judgement]; and the loss of equity in the sum of eight million ($8,000,000.00) dollars.

In the Agreement, Petitioners bargained for—and Respondent agreed—to submit all disputes to arbitration before Respondent could enforce any of the remedies under the Agreement, specifically entry of the Judgment on an ex parte basis. (CT 151.)

Thus, the dictates of due process hold that there should have been a threshold hearing on the arbitrability of the parties' disputed tender before Respondent could lawfully seek entry of the Judgment in the superior court. Moreover, that is what Petitioners bargained for—a hearing, however brief, on the merits of any dispute—before Respondent could enforce the drastic remedies provided in the Agreement. Petitioners did not receive their bargained for notice, and the ex parte Judgment violates Petitioners' constitutionally guaranteed right of due process.

IV. CONCLUSION

A writ of certiorari should issue, since the decision of the California Supreme Court relied upon by the Court of Appeal in affirming the Judgment conflicts with the decisions of this Court regarding enforceability of the FAA in state courts.

The questions presented on review are serious, important and timely. The California Supreme Court's decision opens the way for pre-empting federal law in favor of state law even though there is an express congressional declaration favoring arbitration notwithstanding any state substantive or procedural policies.

For the reasons stated Petitioners respectfully request this Court to grant the writ of certiorari.

Respectfully submitted,

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Dated: October 19, 2000

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APPENDIX A

NO. A085195

IN THE

Court of Appeals of the State of California
First Appellate District
Division Four

San Mateo County
Superior Court
No. 391951

FIRST PACIFIC BANK LIMITED,
Plaintiff and Respondent,

v.

THE BVY GROUP, INC. ET AL.,
Defendants and Appellants.

The BVY Group, Inc., Benedicto Yujuico, and Teresita Yujuico appeal from a judgment for judicial foreclosure entered on the ex parte application of respondent First Pacific Bank Limited. Appellants contend that: respondent breached the parties' settlement agreement by applying for entry of judgment; the court lacked jurisdiction to enter the judgment; and their due process rights were violated in connection with the entry of judgment. We affirm.

FACTS

This action was filed by respondent for judicial foreclosure of property securing indebtedness owed by appellants. While the action was pending, the parties entered into a settlement agreement dated as of August 1, 1997. Attached to the settlement were an agreement for binding arbitration between the

parties, and an arbitration award setting forth the parties' agreements that: appellants owed respondent $7,500,000 as of August 1, 1997; appellants' debt was secured by a property the Yujuicos owned in Atherton; the Atherton property could be sold to satisfy the debt; and appellants would be liable for any deficiency after that sale. Also attached to the settlement were a stipulation for enforcement of the arbitration award, and a stipulated judgment thereon for judicial foreclosure. In the settlement agreement, appellants agreed to pay respondent $5,200,000 in installments ending on August 15, 1998. In the event of a default in the payments, the settlement agreement authorized respondent to pursue various remedies without further notice to appellants, including entry of the stipulated judgment on the arbitration award.

The settlement agreement included the following arbitration provision: "In the event of any dispute relating to or arising out of this Agreement, the exclusive forum for resolution of any such dispute shall be by arbitration in San Francisco, California under the authority of J.A.M.S./ENDISPUTE in accordance with the International Arbitration rules of the American Arbitration Association."

In February 1998 the parties executed an amendment to the settlement agreement which provided for a revised payment schedule extending the final payment to September 15, 1999. Benedicto Yujuico's father, Jesus Yujuico, executed a guaranty for the amount of the remaining payments ($2.2 million) and a consent to the amendment. The settlement agreement had recited that: respondent had made loans to Standard Fund International Limited (SFIL), a corporation owned by Jesus Yujuico, as set forth in agreement between respondent, SFIL, Jesus Yujuico and Conifer Properties, Inc.; and Jesus Yujuico had joined appellants and other parties in a cross-complaint against respondent in the judicial foreclosure action. However, Jesus Yujuico was not a signatory to the settlement agreement or the amendment thereto.

Under the settlement agreement as amended, appellants owed respondent a payment of $450,000, with interest, on September 15, 1998. Respondent's Vice President Peter Choy received a letter dated September 9, 1998, from Lito Bermundo, who had previously signed correspondence to respondent as Jesus Yujuico's financial consultant. The letter noted Choy's "negative reply to our letter request dated August 30, 1998 which basically pleads for a one year extension of principal payments for both the SFIL and BVY Group outstanding obligations," and "submit[ted] another proposal for your consideration as follows: . . .

> We have found a buyer for the BVY Note with the following terms: $100,000 downpayment and the balance to be paid within 12 months or earlier. Interest on the account will be paid quarterly." The letter added: "We realize that you can deny our request and instead foreclose the BVY Group collateral." Respondent rejected this proposal by letter dated September 10, 1998.

On September 16, 1998, Choy wrote appellants and Jesus Yujuico a letter which noted that the September 15 payment had not been received and threatened legal action as provided in the settlement agreement. That same day, Bermundo wrote Choy and proposed, with emphasis in the original, that Jesus Yujuico would "use the funds earmarked from the down payment of the Conifer refinancing to instead purchase the BVY Note from the bank.[1] *He proposes a down payment of $450,000 and the balance to be paid in full by March 15, 1999.* (The original payment term is $450,000 on September 15, 1998 and $850,000 each on March 15, 1999 and Sept. 1999.)[2] *In addition, he proposes to pay legal costs of undertaking the documentation for the purchase of the note, plus a $10,000 fee to cover any administration costs to implement our proposal."*

---

[1] The "BVY Note" apparently referred to appellants' debt under the amended settlement agreement.

[2] This apparent reference to the terms of the amended settlement agreement overstated the $650,000 payments due under that agreement in Marchand September 1999.

On September 17, 1998, Choy wrote Jesus Yujuico and advised that respondent "may consider assigning its entire interest in the BVY loan to any investor on the basis that the Bank receives immediate good funds to satisfactor[il]y discharge full amount of the indebtedness under the BVY loan facility. We regret that your latest proposal of defer and partial payment is not acceptable to us." The letter reiterated the demand for immediate payment of the September 15 installment. On September 30, 1998, respondent's counsel wrote appellants and stated that respondent would exercise its legal remedies if the September 15 payment was not received by October 5.

Appellants' counsel prepared a demand for arbitration dated October 2, 1998, stating that "a dispute has arisen concerning the rights and obligations of the parties under the [settlement] Agreement, namely that First Pacific asserts that BVY has defaulted in its obligations under the Agreement and BVY asserts that it tendered performance which was improperly refused by First Pacific." In a letter dated October 7, 1998, respondent rejected appellants' assertion "that there is any basis whatsoever for further arbitration before J.A.M.S." On October 8, respondent's counsel notified appellants' counsel that respondent would be presenting an ex parte application to the superior court the next day for entry of a stipulated judgment in accordance with the settlement agreement.

Appellants appeared at the October 9 hearing with a memorandum in opposition to the application and presented arguments to the court's research attorney, who conveyed them to the judge. The judge asked appellants' counsel, through the research attorney, whether any provision of the amended settlement agreement obligated respondent to accept a third-party offer like the one made by Jesus Yujuico.

Judgment was entered as requested authorizing respondent to foreclose on the Atherton property and recover any deficiency following the sale. Appellants' motion to vacate the judgment was denied and this appeal ensued.

DISCUSSION

Appellants contend that respondent breached the settlement agreement by seeking entry of judgment before the issue of their alleged tender of performance was arbitrated. Appellants note that they waived various legal rights in the settlement agreement, and maintain that the provision for arbitration of disputes before these "draconian waivers could be enforced" was at "the very heart of the consideration" for the agreement. Appellants submit that once they demanded arbitration, the only way respondent could object to the demand was to assert that objection in the arbitration. They observe that the AAA International Arbitration Rules provide for objections to the tribunal's jurisdiction. (Art. 15.3; see also Art. 15.1, Code Civ. Proc., § 1297.161 [tribunal may rule on its own jurisdiction].)

Whether the application for entry of judgment was a breach of the settlement agreement hinges on appellants' claim that respondent's refusal to accept Jesus Yujuico's offer created a "dispute relating to or arising out of" the agreement within the meaning of the arbitration clause. If there was no arbitrable dispute then respondent did not breach the agreement by obtaining the judgment, and the arbitration demand was an attempt to deprive respondent of *its* rights under the agreement.

Appellants assert that the court lacked jurisdiction to rule on the merits of their arbitration demand or enter judgment while the arbitration proceeding was pending. Appellants take the position that once they identified a "dispute" under the settlement agreement and demanded arbitration, the court was powerless to act until that alleged dispute was resolved by an arbitrator. This position relieves appellants of any need to show that Jesus Yujuico's offer was a valid tender of performance under the settlement agreement. Appellants maintain that "[w]hether [they] did or did not make valid tender, or whether [they] merely offered to modify the terms of the existing contract, are not the issues before this Court."

Appellant's breach of contract and lack of jurisdiction arguments are contrary to the law as stated in *McCarroll v. L.A. County etc. Carpenters* (1957) 49 Cal.2d 45: "The arbitrability of a dispute may itself be subject to arbitration if the parties have so provided in their contract. In this situation the court should stay proceedings pending the arbiter's determination of his own jurisdiction *unless it is clear that the claim of arbitrability is wholly groundless.*" (*Id.* at p. 65 [italics added].)[3] The emphasized language confirms the jurisdiction of the court to determine whether there is any substance to an arbitration demand, and the right of a party to an arbitration agreement to seek such a determination.

As respondent points out, appellants' theory would enable them to indefinitely postpone the entry of judgment with a series of sham arbitration demands. To quote from respondent's brief: "Under [appellants'] theory, they could fail to make a payment and file an arbitration demand, alleging that payment was excused because the sky was gray on the payment date. They could then successfully argue that [respondent] was in breach by seeking entry of the [stipulated judgement] on the ground that their 'gray sky' 'excuse' for nonpayment gave rise to a dispute that 'arose out of' the [arbitration agreement] and had to be arbitrated, and that only an arbitrator could determine its arbitrability.

> Once that sham claim of arbitrability was resolved, [appellants] could manufacture yet another purportedly arbitrable dispute—claiming, for example, that payment was not due because the sun set before 7 p.m. on the payment date."

This case thus illustrates why it is sound policy to reserve a limited "gatekeeping" function for the court, even when the parties have agreed to arbitrate the issue of the arbitrator's jurisdiction. If courts cannot determine whether claims are at

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[3] The holding of the McCarroll case on another point was abrogated by *Drake Bakeries v. Bakery Workers* (1962) 370 U.S. 254, 257. *(Charles J. Rounds Co. v. Joint Council of Teamsters* (1971) 4 Cal.3d 888, 893.)

least arguably subject to arbitration, parties can be subjected to arbitration proceedings for which they clearly have not bargained.

Accordingly, we reject the breach of contract and lack of jurisdiction arguments. Respondent had the right to test the merits of the arbitration demand by seeking the entry of judgment, and the court had the power to determine that the demand was untenable, as it implicitly found by entering judgment over appellants' objection.[4]

Appellants' remaining argument is that the ex parte procedure by which judgment was entered deprived them of due process. However, parties may waive their due process rights in connection with entry of a stipulated judgment (e.g., *County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 112-113, disapproved on another point in *County of Los Angeles v. Soto* (1984) 35 Cal.3d 483), and appellants did so here when they agreed that the stipulated judgment could be filed "without further notice" if they failed to make a scheduled payment. Despite this agreement, respondent notified appellants of the hearing on the application for entry of judgment, and the record shows that appellants were able to fully present their arguments at that hearing and in their motion to vacate the judgment.

Appellants contend that they were wrongfully deprived of oral argument before the judge at the hearing on the application, "leaving all emphasis, nuance and attention to the voluminous and complex details of this case to the research clerk who communicated Appellants' argument to the Judge in chambers ...

> As one leading jurist aptly stated: "'An oral argument is as different from a brief as a love song is from a novel.'" . . .

---

[4] Since appellants do not attempt to justify their claim that there was a valid tender under the settlement agreement, we need not reach that issue.

In the case at bar, the love song was sung to the clerk who sang it to the judge. Something was lost in the translation." However, appellants received more process than they agreed to accept.

DISPOSITION

The judgment is affirmed with costs to respondent.

Hanlon, P.J.

We concur:

Poché, J.

Sepulveda, J.

(A085195, First Pacific Bank v. The BVY Group et al.)

APPENDIX B

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Attorneys for Defendants and Cross-complainants,
The BVY Group, et al.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

FIRST PACIFIC BANK LIMITED, a Hong Kong banking corporation,

Plaintiff,

vs.

THE BVY GROUP, a California Corporation, et al.,

Defendants.

_____/

No. 391951

[PROPOSED] JUDGMENT OF FORECLOSURE AND ORDER OF SALE

Date: October 9, 1998
Time: 2:00 p.m.
Dept. 10
Trial Date: None Set

THE BVY GROUP, a California corporation, et al.,

Cross-Complainants,

vs.

FIRST PACIFIC BANK LIMITED, a Hong Kong banking corporation, et al.

Cross-Defendants.

_____/

WHEREAS, plaintiff First Pacific Bank, Ltd. appeared by Crosby, Heafey, Roach & May, Professional Corporation, counsel; cross-complainants the BVY Group, Inc., Benedicto V. Yujuico and Teresita M. Yujuico appeared by Tatro, Coffino, Zeavin, Bloomgarden, LLP, counsel.

WHEREAS, the parties agreed to settle this action by arbitration; an arbitration award was made by the Honorable Harry W. Low, Arbitrator, and consented to by the parties;

WHEREAS, the parties have entered a Stipulation through which Cross-Complainants The BVY Group, Inc., Benedicto V. Yujuico and Teresita M. Yujuico have stipulated to confirmation of the arbitration award and entry of the instant Judgment of Foreclosure and Order of Sale;

IT IS ADJUDGED, ORDERED, AND DECREED that:

1. The arbitration Award attached hereto is confirmed.

2. There are now due and owing to plaintiff First Pacific Bank Limited from cross-complainants The BVY Group, Inc., Benedicto V. Yujuico and Teresita M. Yujuico, the following sums, secured by: (1) a Deed of Trust dated on or about November 8, 1989, executed by the Yujuicos as trustor, to U.F. Service Corporation, as trustee, for plaintiff First Pacific Bank, Ltd. as beneficiary, recorded on November 20, 1989, as Document No. 89157320 in the Official Records in the Office of the Recorder of San Mateo County, California, constituting a lien on the real property hereinafter described: the sum of $7,500,000, the repayment of which is guaranteed by the Yujuicos.

3. The real property hereinafter described, or so much of it as may be necessary, is to be sold in the manner prescribed by law by the levying officer of San Mateo County, California, on application for issuance of a writ of sale to the levying officer. Any party to this action may be a purchaser at the sale.

4. From the proceeds of the sale, the levying officer shall deduct the expenses for the levy and sale, and shall then pay to plaintiff the sums adjudged due, together with interest from the date of this judgment at an annual rate equal to seven (7) percent.

5. If any surplus remains after making these payments, it shall be paid by the levying officer to cross-complainants The BVY Group, Inc., Benedicto V. Yujuico and Teresita M. Yujuico.

6. Cross-complainants The BVY Group, Inc., Benedicto V. Yujuico and Teresita M. Yujuico, are liable for payment of the sums secured by the Deeds of Trust and a deficiency judgment may be ordered against them following proceedings prescribed by law, and cross-complainants Benedicto V. Yujuico and Teresita M. Yujuico have personally guaranteed repayment of such sum. The Court retains jurisdiction to determine the amount of the deficiency, if any, and to render a money judgment on proper application therefore against BVY hereunder or Benedicto V. Yujuico and Teresita M. Yujuico under their Guaranty.

7. A deficiency judgment not being waived or prohibited, the property is to be sold; provided, however, that BVY has by separate agreement waived its rights of redemption provided in Sections 729.010 to 729.090, inclusive, of the Code of Civil Procedure.

8. From and after the delivery of the Deeds by the levying officer to the purchaser at the sale, cross-complainants The BVY Group, Inc., Benedicto V. Yujuico and Teresita M. Yujuico and all persons claiming under them, and all persons having liens subsequent to the Deeds of Trust by any judgment on the real property hereinafter described, and their personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in the property subsequent to the filing of notice of the pendency of this action with the county recorder are forever barred and foreclosed from all equity of redemption in, and claim to, the property and every part thereof.

9. The property which is the subject of the judgment and order is situated in San Mateo County, California, and is described as follows:

(1) Parcel "B", as shown on that certain map entitled "PARCEL MAP BEING A SUBDIVISION OF LOT 8B AND A PORTION OF LOT 3A, MAP OF QUILLOTA TRACT FILED IN VOLUME D OF MAPS AT PAGE 32, SAN MATEO COUNTY RECORDS, TOWN OF ATHERTON, SAN MATEO COUNTY, CALIFORNIA", which map was filed in the office of the County Recorder of San Mateo County, State of California, on August 2, 1971, in Book 13 of Parcel Maps at Page 20.

DATED: _____

_____
JUDGE OF THE SUPERIOR COURT

Court of Appeal, First Appellate District, Division Four
No. A085195

S090027

IN THE SUPREME COURT OF CALIFORNIA

En Banc

FIRST PACIFIC BANK LIMITED, Plaintiff and Respondent,

v.

THE BVY GROUP INC., et al., Defendant and Appellants.

Petition for review DENIED.

GEORGE
Chief Justice